

**DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E**

**IN RE:** Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans

The South Carolina Office of Regulatory Staff (“ORS”) hereby submits this Reply to the South Carolina Electric & Gas Company’s (“SCE&G”) Response to ORS’s Motion to Compel Removal of Confidentiality Designations (“Motion”) pursuant to Public Service Commission or South Carolina (“Commission”) Order No. 2018-135-H.<sup>1</sup>

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## INTRODUCTION

Pursuant to Commission Order No. 2018-100-H, the merits hearings in these consolidated dockets will begin on November 1, 2018.

On October 1, 2018, ORS filed with this Commission the Motion whereby it respectfully moved the Commission for expedited review and order compelling SCE&G and Dominion Energy, Inc. (“Dominion”) to remove confidential designation from documents produced in discovery that have no basis to be considered confidential.<sup>2</sup> Additionally, the Motion requested that the Commission order the confidential designations be removed from specific documents that ORS attached to its Motion.<sup>3</sup> South Carolina ratepayers, along with the Commission, deserve to know the full story of what transpired regarding the failed nuclear project, and SCE&G’s insistence that non-confidential documents be kept hidden only serves to deny the public and Commission of relevant facts.

On October 4, 2018, SCE&G filed its response to ORS’s Motion with the Commission. SCE&G’s response states that ORS’s Motion challenges SCE&G’s confidentiality with respect of five categories of documents SCE&G designated as confidential pursuant to a 2009 Nuclear Facility Master Confidentiality Agreement.<sup>4</sup> SCE&G also stated that while its confidential

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<sup>2</sup> Previously, on May 23, 2018, SCE&G’s actions forced ORS to file a Motion to Compel (May Motion to Compel) SCE&G to produce discovery. On June 21, 2018, the Commission issued Order No. 2018-73-H, in which SCE&G was required to produce many of the documents ORS requested in its May Motion to Compel. However, on August 8, 2018, a month-and-a-half after the Commission required SCE&G to comply, SCE&G’s actions forced ORS to file a Motion to Sanction SCE&G for its disregard of Commission Order. In Commission Order No. 2018-117-H, the Commission Hearing Officer described SCE&G’s production of documents to that date as, “troubling.” Only in response to all of this, did SCE&G agree to capitulate and “[reevaluate] its position on ORS Discovery Requests....” (See the Report of Stipulations filed in Commission Docket Nos. 2017-207, 305, and 370-E, on August 21, 2017)

<sup>3</sup> See Motion Exhibits. Exhibit A details certain Bechtel related E-Mails; Exhibit B details fraudulent activity conducted by an SCE&G vendor; Exhibit C details an SCE&G created privilege log; Exhibit D details E-Mails regarding the V.C. Summer Nuclear Units 2 and 3 completion date schedules; Exhibit E details a V.C. Summer Nuclear timeline.

<sup>4</sup> With the abandonment of the construction of the new nuclear units, just as this Commission found with the EPC contract, the majority of these documents should no longer be entitled to protection.

designations were made in good faith, it was willing to remove its confidential designation for “documents in the specific categories of documents identified in ORS’s Motion....” However, SCE&G followed this statement up by stating, it has begun a process to evaluate its confidential designations and will notify ORS “as soon as possible.” Finally, SCE&G stated that it would agree to remove the confidentiality designations it previously applied to the Attachments in the Motion and to review other documents labeled confidential with a deadline date of October 26<sup>th</sup>, 2018.

While it is the understanding of ORS that SCE&G has agreed to remove the confidentiality designations it had applied to Motion Exhibits A, B, C, D, and E, due to the compressed timeline of this proceeding, it is unreasonable for SCE&G to wait until October 26<sup>th</sup>, 2018, to reveal whether it has determined any additional documents may be made public. Furthermore, given SCE&G’s historical approach to turning over documents it previously agreed to release, it is grossly unfair to put ORS in the position of having to respond to SCE&G’s new designations subsequent to October 26<sup>th</sup>. To assist SCE&G, ORS has identified additional documents that should no longer be identified as confidential. These documents are filed under seal and attached as Exhibit F.

The public and Commission deserve to know the full story of what transpired. As a result, and for the reasons detailed below, this Commission should compel SCE&G and Dominion to remove the confidential designation from documents produced in discovery that have no basis for being marked confidential by October 22<sup>nd</sup>.

### **DISCUSSION**

#### **A. The Master Confidentiality Agreement is not Relevant to All Information Sought in the Motion**

SCE&G correctly asserts that in Commission Order No. 2018-73-H, ORS agreed that the 2009 Master Agreement was still in effect and applied to information produced in these proceedings;<sup>5</sup> however, the nexus between this agreement and much of the information that ORS's Motion relates to is unclear. ORS's Motion specifically requests the Commission compel SCE&G to remove the cloud of confidentiality from all Bechtel related documents, documents in the ORS New Nuclear Development Data Electronic Reading Room, and to make a determination regarding what responses to ORS AIR 5-25 are confidential and which are not entitled to confidential protection.

Many documents, including Bechtel reports, already exist in the public sphere. As a result, any privilege SCE&G claims no longer exists.<sup>6</sup> Furthermore, SCE&G has selectively released certain Bechtel documents, whereas it previously committed to "produce documents that provide the full account of the Bechtel engagement and assessment...." (*See* Joint Applicants' Response to Motion to Compel at 5, filed with this Commission on June 11, 2018). Also, as cited in ORS's Motion to Sanction filed with this Commission on August 8, 2018, according to *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 46-47 (Ct. App. 1984), voluntary disclosure waives the attorney-client privilege not only as to the specific communication disclosed, but also to "all communications between the same attorney and the same client on the

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<sup>5</sup> While ORS agreed on June 21, 2009, that the 2009 Master Agreement was still in effect, it would point out that South Carolina Act 258 includes confidentiality protections afforded certain utility produced information. As a result, for documents and information produced by SCE&G pursuant to Section 58-4-55 as modified by Act 258, the 2009 Master Agreement has effectively been superseded by a change in law.

<sup>6</sup> The privilege and protection for any documents related to the Bechtel Report has been waived by the State of South Carolina, by and through the Governor and his authority and control over the South Carolina Public Service Authority, after concerns focused on the results of Bechtel's assessment and Report. *See Also* ORS's Motion to Compel filed with this Commission on May 23, 2018, which stated, "...because SCE&G failed to disclose Bechtel's assessment and Report to further SCE&G's fraudulent or criminal conduct, no documents or communications between SCE&G and Bechtel are protected by privilege. South Carolina courts "widely recognize" [the] rule that [the attorney-client] privilege does not extend to communications in furtherance of criminal [,] tortious or fraudulent conduct." *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 383 —84, 453 S.E.2d 880, 884 —85 (1994) (citing *Slate v. Doster*, 276 S.C. 647, 651, 284 S.E.2d 218, 220 (1981) (internal citations omitted))."

same subject." The reason behind this rule is "one of basic fairness," as a party "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final." *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1161- 62 (D.S.C. 1974).

From SCE&G's response, it is unclear which documents it believes are entitled to continued protection, whether pursuant to the 2009 Master Agreement, or by some other means. All that is clear from SCE&G's production thus far is that it prefers a blanket of confidential protection around all documents it produces, regardless of whether that document should be afforded confidential treatment.<sup>7</sup>

**B. SCE&G's Offer to Narrow the Scope of its Designations by October 26<sup>th</sup> is Insufficient**

This case is of enormous importance to the Commission, ratepayers, and the South Carolina public. All parties are dealing with compressed timelines, and as a result, are having to place priority on certain issues over others. One issue that must not be under-prioritized is the release of facts to the Commission and public. Throughout this case, SCE&G has sought to color this story with only the facts that it chooses. As a result, ORS, and other parties, have had to fight for much of the information it requires to conduct its analyses. As noted above, SCE&G's compliance with production has been troubling.

In its response to ORS's Motion, SCE&G states, "[it] is willing to review the designations it has applied on the documents within the categories the ORS mentioned in the Motion and narrow the scope of its confidentiality designations," and that it "proposes a deadline of October

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<sup>7</sup> Examples of inappropriately marked documents cited in the Motion include SCE&G marking pre-filed public testimony, Commission Orders, and publicly filed petitions, as confidential. It belies common sense to state that a good faith effort was made by the Company and that it determined these documents to be entitled to confidential protection.

26<sup>th</sup> to provide ORS with its revised confidentiality designations....” SCE&G cannot be allowed to further dictate the parameters of this proceeding by now stating it will conduct an additional review and let ORS know by Friday, October 26<sup>th</sup>, a mere three business days before the hearing is set to begin, of its revised confidentiality designations. ORS’s Surrebuttal Testimony due date is October 29<sup>th</sup>.<sup>8</sup> ORS may wish to utilize certain SCE&G documents as exhibits to its Surrebuttal Testimony. Therefore, in a good faith effort to compromise with the Company’s proposal, and understanding the volume of documents that must be reviewed, ORS proposes that SCE&G provide it with revised confidentiality designations by October 22<sup>nd</sup>.<sup>9</sup>

### **CONCLUSION**

For the forgoing reasons, ORS respectfully requests that the Commission grant ORS’s Motion and compel SCE&G to remove the confidential designation from documents produced in discovery that have no basis for being marked confidential by October 22<sup>nd</sup>, while updating ORS weekly of any documents from which the confidentiality designation are removed, and find that the documents set forth in Exhibit F should no longer be entitled to protection.

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<sup>8</sup> See Commission Order No. 2018-122-H.

<sup>9</sup> In the meantime, and in a show of good faith, ORS would also request that the Company update ORS on a weekly basis of the documents it has identified as public.

Respectfully submitted,



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**Attorneys for the South Carolina Office of  
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October 8, 2018

# EXHIBIT “F”

**REDACTED**